IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 35

SECURITIES AND EXCHANGE COMMISSION,
Petitioner

v.

AMERICAN TRAILER RENTALS COMPANY,
Respondent

ANSWER BRIEF OF AMERICAN TRAILER RENTALS COMPANY

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QUESTION

Do the lower courts have discretion to determine whether a Chapter XI arrangement meets the public and private needs to be served where certain creditors, owners of trailers leased to debtor, have been asked to exchange their trailers for stock, on a completely voluntary basis, and where all other creditors, including stockholders' equity claims, are settling their claims for stock, or is such arrangement prohibited by some restriction in the Bankruptcy Act?

STATUTES INVOLVED

Bankruptcy Act:

Chapter XI, Section 366 (11 U.S.C. §766)

"*Requisites for Confirmation*

"The court shall confirm an arrangement if satisfied that — (1) the provisions of this chapter have been complied with; (2) it is for the best interests of the creditors and is feasible; (3) the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt; and (4) the proposal and its acceptance are in good faith and have not been made or procured by any means, promises, or acts forbidden by this title.

"Confirmation of an arrangement shall not be refused solely because the interest of a debtor, or if the debtor is a corporation, the interests of its stockholders or members will be preserved under the arrangement."

Chapter XI, Section 328 (11 U.S.C. §728)

"*Dismissal Proceedings; Amended Petition*

"The judge may, upon application of the Securities and Exchange Commission, or any party in interest, and upon such notice to the debtor, to the Securities and Exchange Commission, and to such other persons as the judge may direct, if he finds that the proceedings should have been brought under chapter 10 of this title, enter an order dismissing the proceedings under this chapter, unless, within such time as the judge shall fix, the petition be amended to comply with the requirement of chapter 10 of this title for

the filing of a debtor's petition or a creditors' petition under such chapter, be filed. Upon the filing of such amended petition, or of such creditors' petition, and the payment of such additional fees as may be required to comply with section 532 of this title, such amended petition or creditors' petition shall thereafter, for all purposes of chapter 10 of this title, be deemed to have been originally filed under such chapter."

Chapter X, Section 130 (11 U.S.C. §530)

"Every petition shall state — . . . (7) the specific facts showing the need for relief under this chapter and why adequate relief cannot be obtained under chapter 11 of this title; . . ."

Chapter X, Section 147 (11 U.S.C. §547)

"*Amendment of Petition to Comply with Provisions Governing Arrangements*

"A petition filed under this chapter improperly because adequate relief can be obtained by the debtor under chapter 11 of this title may, upon the application of the debtor, be amended to comply with the requirements of chapter 11 for the filing of a debtor's petition, and shall thereafter for the purposes of chapter 11 be deemed to have been originally filed thereunder."

STATEMENT OF FACTS

American Trailer Rentals Company was organized in 1958 in Denver, Colorado. (R. 3) Its primary purpose was the rental of utility trailers to the public through a system of trailer rental stations throughout the United States.

(R. 3) For the most part these rental stations are gasoline service stations, which, at one time numbered 700. At the time of the filing of Chapter XI, the number of stations was approximately 500. (R. 3)

The trailers are utility trailers rented by the public for various personal purposes, from the hauling of trash to the moving of furniture cross country. The trailers were leased to the company for this use for the most part for 2% of the cost of the trailer[1] per month for 10 years by the owners.[2] The trailers were sold to the owners by various state sales companies in the states involved, and upon manufacture a title to the trailer (as in the case of a motor vehicle) was issued by the titling states, in the name of the trailer owner, which title was delivered to the owner and retained by him. All of the state sales companies operated by virtue of a contract with Executive Sales Company since merged into the debtor. A simultaneous lease was executed by these owners with a state rental company located in the state where the trailers were purchased, which state companies then turned the actual operation of the trailers over to American Trailer Rentals Company by virtue of an operating agreement. These state companies, for the most part, have been merged into the debtor. (R. 131) The price of the trailer included a commission out of which the state sales companies retained 20% of the sales price, and Executive Sales Company received an amount equal to between 5% and 17% of the sales price.[3] (R. 74)

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[1]A small portion were leased for 3% per month for 5 years and some for 35% of gross rentals.

[2]These leases were not related to the income of the system and created the primary financial problem of the company.

[3]From the amount received by Executive Sales Company, certain loans were made to the debtor which funds were used for the general purposes of the debtor. (R. 76) The debt from the debtor to Executive was balanced with a debt due from Executive to American and the merger between American and Executive was on a straight stock basis.

The balance of the purchase price was paid by Executive Sales Company to the manufacturer for the manufacture of each trailer.

At the peak, the company had 5,868 trailers committed to its fleet although at the peak period of operation there were only about 3,000 trailers actually operating in the system. (R. 118) The management of the company has been in three different groups from the commencement of the operation until the present date. (R. 121-122) The first two management groups were replaced and the third, or present group, came into actual control of the debtor in July of 1960. They have attempted by various direct means to resolve the problems of the company but have been unable to do so. (R. 112)

On April 12, 1961, and thereafter, the Securities and Exchange Commission engaged in an investigation of the company and the company was advised by the Securities and Exchange Commission that the Securities and Exchange Commission believed this overall program constituted a sale of a security.[4] The company thereafter commenced preparation for filing of a registration statement.[5] It had been advised by the Securities and Exchange Commission that a financial statement need not be completely certified and it thereafter filed a registration statement. (R. 82) This registration Statement was filed on December 11, 1961. (R. 22) The company heard nothing on the attempted registration until November 27, 1962 (R. 17) at which time the Securities and Exchange Com-

[4]Quite the contrary from the statement in the Securities and Exchange Commission's brief, the company was never advised why this was believed to be a security, just that it was believed to be a security and to stop sales or be stopped.

[5]The uneconomical leases on the trailers did not constitute the only claim on the company revenue. The compliance with Securities and Exchange Commission requirements subsequent to April 12, 1961, also created financial problems for the company. (R. 112)

mission issued a temporary order suspending the effectiveness of the registration which had never become effective.

After the investigation by the Securities and Exchange Commission and numerous conferences with the commission staff, some of the trailer owners, together with the vice president of the debtor, formed a company called Capitol Leasing Corporation and, relying on the Regulation A exemption of the Securities Act of 1933, made an offer to the trailer owners of American offering to exchange stock in Capitol for their trailers at the rate of one share of stock for every $2 invested in the trailers to be exchanged. On October 9, 1962, the Securities and Exchange Commission suspended this offering and a hearing has been had on this matter.

On December 20, 1962, the company, faced with uneconomic leases and no way to resolve the dilemma, with mounting monthly obligations which could not be met, filed the subject Chapter XI.

THE PROPOSED ARRANGEMENT

The arrangement proposed by American anticipates the issuance of common stock of Capitol Leasing Corporation, a Colorado corporation, in satisfaction of the obligations of American on the following basis:

1. Capitol Leasing Corporation will issue one share of its stock to trailer owners for each $2 of remaining capital investment in exchange for title to the subject trailers. Remaining capital investment is determined by deducting from sales price of the trailers the amount paid by American to trailer owners (including certain trailer

owners whose trailers were never manufactured due to bankruptcy of the manufacturer.)

2. Capitol Leasing Corporation will issue one share of its stock for every $3.50 of claim of general creditors.

3. Capitol Leasing Corporation will issue one share of stock for every $5.50 of claim for loans by stockholder-creditors to American. These shares also carry restrictions on voting (one vote for every seven shares of stock) and no participation in dividends or liquidation for five years.

4. Trailer owners who do not elect to participate in the plan may take possession of their trailers.

As an adjunct of the plan, Capitol Leasing Corporation proposes to buy the operating system of American for 107,100 shares of its stock.

Presuming that 2,000 trailers are exchanged for stock under the plan, the following is a breakdown of the stock of Capitol Leasing Corporation upon completion of the plan:

	Shares in Capitol	*Ownership*
1. Trailer owners who exchanged for stock	510,966	58.0%
2. Trailer owners whose trailers were not manufactured	100,388	11.4%
3. Shares of Capitol heretofore exchanged for trailers	176,665	10.0%
TOTAL SHARES ISSUED FOR TRAILERS		79.4%

	Shares in Capitol	*Ownership*
TOTAL SHARES ISSUED FOR TRAILERS		79.4%
4. Creditors excluding shareholders	21,827	2.5%
5. Creditors who are shareholders	52,407[1]	6.0%
6. Shareholders	107,100	12.1%
		100.0%

The Securities and Exchange Commission filed a motion under Section 328 of Chapter 11, Bankruptcy Act (11 U.S.C. §728) demanding dismissal of the proceedings. This motion was heard by the Chief Referee in Bankruptcy for the District of Colorado, as Master, who recommended denial of the motion. The district court adopted the Master's findings and on appeal, the court of appeals affirmed the lower court.

SUMMARY OF ARGUMENT

In the proposed Plan, we are dealing with an arrangement which has survived attack by the Securities and Exchange Commission before three separate judical bodies — the Chief Referee in Bankruptcy, the presiding Judge of the District Court for the State of Colorado, and the United States Court of Appeals for the Tenth Circuit; which has been accepted by the majority in number of claims filed and the majority in dollar amounts of claims

[1]The plan originally proposed to issue one share of stock for every $3.50 of these claims but was amended to reduce the participation of these claimants. The plan was also amended to reduce voting rights to one vote for every seven shares owned, with no participation in dividend or liquidation for five years.

filed; which has been found to be feasible and in the best interests of creditors by the four judges and Referee before whom the matter has previously been litigated; and which has been confirmed on May 23, 1963.

For the case at bar the proposed Chapter XI arrangement provides the simplest, most feasible and probably the only workable method of meeting the needs to be served. The plan which is herein proposed provides for continuous operation of the company, which is essential; provides for absolute control of the company in the creditors (81.9%) over and against the director-creditors (6%) and the stockholders (12.1%) which is desirable; provides for commencement of operation after the plan in a practically debt-free company which is an economically enviable position; and weighs every phase of the plan in favor of the creditors, which appears to be necessary. While a great deal of criticism of the plan has been done by the Securities and Exchange Commission and despite a two year lapse since the filing of the plan, no one has been able to suggest an alternate plan which has any hope of success. While creditors, including trailer owners have participated in the proceedings, none have seen fit to join the Securities and Exchange Commission in its attempts to dismiss. The proposed plan has a chance of success, a Chapter X would result in ordinary bankruptcy and provide absolutely nothing for any interest. The main point of the Securities and Exchange Commission is that the rights of trailer owners are being affected by the proposed arrangement, which point completely overlooks a unique feature of the plan, i.e. in all particulars where the plan touches the trailer owners, the participation is completely and individually voluntary. No single trailer owner is required (regardless of vote of others) to participate. The

use of the term public-investor creditors in this case is misleading as the claims of trailer owners are based upon unpaid rentals and not upon an unpaid investment debt.

The statute in question, Chapter XI not only does not prohibit the type of arrangement proposed here, but actually anticipates such a use. By allowing adjudgment of all unsecured creditors' rights and by permitting the stockholders to retain rights in the arrangement Chapter XI anticipates the widest possible latitude in the types of arrangement proposed. The Securities and Exchange Commission contends that Chapter XI may not be used where public creditors are involved but if Congress had intended restrictions on the use of Chapter XI when public creditors were involved, the statute would so provide. Far from intending restrictions Congress, by the amendments of 1952 deleting the only restriction in Chapter XI, indicated that set standards were not to be applied to Chapter XI. By the existence of Chapter X and Chapter XI, both directed to adjustment of unsecured debts, Congress intended the use of whichever of the chapters provided the best answer to a particular factual situation. By the reference back and forth between the two chapters, Congress created a counterbalance which operates to the benefit of plans proposed under either chapter.

This Court, in examination of the provisions of Chapter X and Chapter XI has consistently refused to supply restrictions to Chapter XI where none exist. The previous decisions rest on the principle of the lower courts exercising their discretion in determining which chapter best meets the needs to be served. In the case at bar the lower court made an examination and investigation of the plan of arrangement proposed, exercised its discretion and de-

termined that Chapter X did not best meet the needs to be served. Separating the logic from the irrelevancies, it is clear that the Securities and Exchange Commission wants this Court to declare that the lower courts have no discretion in an arrangement which has public creditors; and wants this Court to declare that the lower court must dismiss such a Chapter XI proceeding. The Securities and Exchange Commission falls far short of establishing reason for this by use of the prior decisions of this Court. Equally as illogical, the Securities and Exchange Commission would have this Court write restrictions into Chapter XI, which restrictions Congress has not seen fit to insert.

The lower courts based their determinations upon the applicable statutes, guided by the prior determinations of this Court as applied to the facts of this case. In so doing, they properly applied the law, followed the precedents and exercised their discretion for the best interest of the creditors of the debtor.

ARGUMENT

THE ARRANGEMENT PLAN, PROPOSES THE SIMPLEST, MOST FEASIBLE AND PROBABLY THE ONLY WORKABLE METHOD OF MEETING THE NEEDS TO BE SERVED.

The plan as confirmed provides that the trailer owners whose trailers are still in the system may exchange their trailers at the rate of one share of stock of Capitol Leasing Corporation for every two dollars of remaining investment; the general creditors at the rate of one share of stock for every $3.50 of claim; (R. 6) and the stock-

holder claimants, one share of stock for every $5.50 of claim. (R. 148) As an adjunct to the plan, Capitol Leasing Corporation is purchasing the operating system of American for 107,100 shares of stock. (R. 7) As an overall proposition, no simpler arrangement could be devised as the plan directly attacks every major objection to the previous uneconomic operation of the company, and provides the wherewithall to complete the arrangement.

The Control of Capitol Leasing Corporation Will be in the Trailer Owners

One of the major objections of the operation of the company heretofore has been that the group with the largest financial participation, the trailer owners, have had no way, in law or in fact, to effectively participate in the management of the company.

Under the proposed plan the trailer purchasers will have overwhelming control of Capitol Leasing Corporation.[1] Any management which is selected will be selected at the discretion of this group. This is so because of the weighing of all aspects of the arrangement in favor of the trailer owners. Not only will the trailer owners receive almost three times the amount of stock in Capitol, per dollar, as the stockholder-creditors, but the trailer owners will vote one vote for every share of stock owned and the stockholder-creditors will vote only one vote for every seven shares of stock owned. (R. 148) Stated another way, for every dollar invested, the trailer owners will have two and three-quarter times the ownership and nineteen and one-quarter times the voting power in Capitol Leasing

[1]Under the proposed arrangement (presuming 2,000 trailers are delivered to Capitol Leasing) the persons who own stock in Capitol which was received for trailers or claims for trailers will own 79.4% of the outstanding stock of the company.

Corporation as stockholder-creditors. In addition, all of the present stockholders of Capitol Leasing may be classified as trailer owners as they received their stock in exchange for trailers. There is no question but what the trailer owners will exercise complete control of Capitol. The plan also provides that stockholder-creditors will not participate in dividends or liquidation for a period of five years. (R. 148) Of course, management of the two companies is now separate (one common director) but new management beyond this is subject to the complete pleasure of the trailer owners.

The Plan Provides Interim, Experienced Management, Continuous Operation and an Orderly Transition to New Management

While the plan of arrangement itself is the epitome of simplicity, the operation of the system requires experience in the business. The arrangement provides an orderly transition in management and experienced, interested management in the interim. The system, as previously noted, is a network of rental stations. These stations are, for the most part, filling stations located across the United States. (R. 110) Changes in ownership, a lack of business sensitivity and just plain indolence on the part of some of the stations cause recurring problems with which management must deal. The handling of these problems requires knowledge of the books and records of the company, particularly with reference to the original method of setting up stations, to the knowledge of what to do with trailers in a station where that station cancels its contract, to the best manner of handling storage charges where the station attempts to make such charges for periods covered by its contract, to the methods available for tracing missing trailers, to the miriad details in attempting to keep

track of many trailers located all over the United States. For the benefit of trailer owners, the trailer system must be kept in operation and any plan which does not provide for this continuous operation can only result in the probability of total loss to many of the trailer owners.

The trailer owners are not "public investor-creditors" in the accepted sense as they may remove their trailers at any time. The plan, insofar as trailer owners go, is completely voluntary.

The position of the trailer owners should be clearly defined. They were not investor-creditors having only an intangible right or claim against the respondent. They were owners of tangible personal property of which they could take possession. By simple request to the respondent, they could withdraw their trailers from the system and use them elsewhere. (R-157) The respondent, through its records as to the location of the trailers, assisted the owners in finding them. 2600 trailers had been so withdrawn prior to the filing of the Chapter XI petition and an additional 1000 were withdrawn during the course of the proceeding, all with the assistance of the respondent. The trailer was the trailer owners investment and this could be withdrawn at anytime. The rental claims fall in the nature of general creditors.

Trailer owners were not investor-creditors in the sense used by the Commission as a debenture holder or other unsecured debt security having only an intangible claim for money and at the complete mercy of a debtor for payment or information as to the value of his claim.

The plan of arrangement rejected the leasing agreements by which it operated the trailers as executory con-

tracts and thus voluntarily released the trailers back to the owners. It was expected that the owners of 2000 trailers would elect to leave their trailers in the system and accept the plan. The Commission's phrase "public investor-creditors" is not only not descriptive but is misleading. There could not be any overreaching of the trailer owners by the respondent in the formulation and presentation of the plan to the trailer owners. Each was the master of his own destiny. The acceptance of the plan allowed the respondent to continue to serve the trailers and its efforts to maintain the business.

The directors of American are making continuing contributions of time and money which are more valuable than unneeded machinery of Chapter X.

The proposed plan provides for continued management and at a minimum cost. The directors of the company have assumed the two largest general debts of American and are to receive one share of stock for every $5.50 of these claims. (R. 149) The directors have also advanced all legal fees and costs involved in the Courts to date, have provided funds for some continuing administrative expense and will have to provide the deposit necessary to final confirmation. In addition, one director has devoted full time to the affairs of the company without compensation. (R. 90) Without these additional contributions of time and money, no program of rehabilitation would be possible. This is coupled with the knowledge of the operation of the system which comes only with experience. The continuation of the knowledge and the continuing contributions by management are a necessary part of most Chapter XI proceedings and are certainly of greater benefit to the trailer owners here than the extra safeguards

of a Chapter X where there has been no showing of the need for the safeguards.[2] In such a situation, Chapter XI is not only available but is the only workable arrangement.

The plan provides a means whereby non-participating trailer owners may locate and obtain possession of their trailers which might otherwise be lost.

Many of the trailer owners do not desire to participate in the arrangement and are removing or desire to remove their trailers from the system for other purposes. These trailer owners have been, and are being, supplied locations for their trailers and releases authorizing the station operators where the trailers are located to surrender the trailers in his possession to the owners or their agents. In order for this system to continue to function and make the trailers available to the owners, a current location list must be maintained. (R. 112) The cooperation of the station operators must be available. Only in an operating system are these two elements present. The company uses the following method of maintaining trailer location lists. The station operator, using a company form, notifies the company of the departure of a trailer, the destination and other pertinent data; the receiving station,

[2]As was stated by the court of appeals for the second circuit. **In the Matter of Transvision, Inc.**, 217 F.2d 243:

> "The SEC had adduced no information which would tend to indicate that the plan is likely to fail, but has, at most, indicated that there may be some basis for suspecting possible improprieties in past management. Certainly, so ephemeral a suspicion is not an adequate basis upon which to overturn a plan which the District Court, on the facts before it at this time, appears to believe may ultimately be found feasible, and one which, necessarily, would have to be acceptable to at least a majority of the unsecured creditors before being approved. Any dissenting unsecured creditors will be protected if they can show unfair treatment. **Mecca Temple, etc. v. Dancock, supra.** And there is nothing in the action of the District Court which precludes resort by the stockholders or other corporate interests to any other remedies which may be available should any of them seek any redress for any wrongs previously done them by the management."

upon receipt of the trailer, using a company form, advises the company of the trailer arrival; the company uses this information in keeping its own records to date. (R. 111) One miss in reporting by the stations or one miss in recording by the company and the trailer is temporarily lost requiring tracing procedures. Failure of the renter to turn in the trailer or a station refusing to accept a trailer requires immediate administrative procedures. The very philosophy of a Chapter XI requires the company to continue its operations and, in this case, to continue to provide these services. Reference is once again made to the continuing contributions of money and time by the Board of Directors. When filing a Chapter XI, management must be willing to undertake these things and in this case it was done. Neither a Chapter X nor an ordinary bankruptcy can provide these outside contributions. While there are cases where a Chapter X meets the needs to be served, the present case is not one of them.[3] It is inconceivable that a Chapter X would work and ordinary bankruptcy would entail a loss, greater even than in the usual bankruptcies.

The assumption that the company can qualify for a Chapter X is fallacious as the leasing agreements would prohibit such qualification.

A Chapter X proceeding would have been doomed to failure from the start. An order transferring to Chapter X would have the trustee take over the operation of the

[3]The district court, in denying the motion of the Securities and Exchange Commission to dismiss the proceedings, stated at page 145 of the record:

> "As I stated at the outset of this hearing, I have studied the file in this case prior to the hearing. I listened to the arguments of counsel, and I am not convinced that the needs to be served here can best be met by a Chapter 10."

later in the same ruling, at page 147 of the record, the district court stated:

> ". . . I think Chapter 11 is available in the state of the matter as it is presented to the Court at this time."

business and take possession of the property and assets of the debtor. The respondent had only office furniture and service equipment. This is all a trustee would have here.

The use of Chapter XI in preference to Chapter X is dictated because the order of transfer and appointment of a trustee, essentially a receiving order, would terminate all leasing agreements concerning the trailers.[4] Possession would, by operation of such an order, be returned to trailer owners; they would be entitled to all revenue from any subsequent rental of the trailers and not the trustee.

While additional contributions of time and money by the directors, caused by the long delay occasioned by the repeated appeals of the Securities and Exchange Commission, has been a drain on their resources, the real victims of this delay are the trailer owners who wished to participate in the Arrangement. Because of the lapse of time involved, the trailer owners are necessarily confused and uncertain, and in certain instances, unjustified storage charges now constitute liens against the trailers and must now be litigated. It stands to reason that some trailers are lost, damaged and stolen. The dismissal of Chapter XI could result in nothing but frustration of these trailer owners' rights.

An ordinary bankruptcy would mean probable total loss for trailer owners.

If the motion of the Securities and Exchange Commission is granted, the plan is not automatically converted to

[4]The leases in question provide for automatic termination upon entry of a receiving order. The Referee admitted a lease copy into evidence but it has not been printed as a part of the record.

a Chapter X. If the plan cannot be conformed to a Chapter X, the only alternative is an ordinary bankruptcy.[5]

Therefore, consideration must be given to the effect of an ordinary bankruptcy.[6] A trustee would be even less empowered, and inclined, to maintain the locations of trailers.[7] The problems before outlined would be multiplied because the trailers to be removed from the system would include the trailers of the persons who have stated their desire to participate in the plan. While the records turned over to the trustee would be adequate for locations at that time, these records quickly become outdated because of trailer movements. By the time the trailer owners have had an opportunity to evaluate their position and take the necessary steps to obtaining possession, the trailers will, in many instances have moved. Compounding the problems of the trailer owners at this point is the rapidity with which station operators change their operation from trailer rental to trailer storage. Because a Trustee in ordinary

[5]**Annual Reports of the Securities and Exchange Commission.** Volumes 25, 26, 27, 28 and 29 show that ordinary bankruptcy is more often the case than conformance to Chapter X. From the period 1959 to 1964, the Securities and Exchange Commission interposed motions to dismiss in 19 Chapter XI cases. 15 of these motions were granted and four denied. Of the 15 granted, eight ended in ordinary bankruptcy and seven were conformed to Chapter X. This is not to say that the eight or some part of them would not have ended as ordinary bankruptcies anyway and this may have been a factor in granting the dismissal. On the other hand, this cannot be taken to say that some may not have succeeded as Chapter XI's. Of inter st in this statistic is the noticeable fact that the lower courts are exercising discretion in considering the Securities and Exchange Commission's motions to dismiss and have dismissed (or allowed to be conformed) 15 of the 19. This phenomenal success in persuading the lower courts has not, however, sated the appetite of the Securities and Exchange Commission as they have appealed every case in which they were denied.

[6]The court of appeals stated (R. 161) "The debtor has little or no tangible assets, and if it were liquidated it is not unlikely that the trailer owners, or at least many of them, would have difficulty realizing anything for their trailers."

[7]It is suggested a trustee in an ordinary bankruptcy would be able to do nothing except reject the trailer leases as executory contracts and make the records available to trailer owners for the purpose of determining locations.

bankruptcy would have no interest in the continuation of the rental system, the trailer owners would have to dispute the storage charges, right to possession and even, in many cases, determine the locations of the trailers, as an individual matter. This would create an impossible burden for those who own one trailer (value $500) facing legal fees, travel and hauling costs, and possible court fees. This does not take into consideration the actions of a few latently dishonest station operators and trailer pirates around the country. The results of lack of an organization in an ordinary bankruptcy would almost certainly be disastrous.

The plan is probably the only plan available to the company, to the best interest of creditors.

To accomplish these highly desirable objectives, the proposed plan has a basic asset which is readily apparent. This asset is the very simplicity of the plan. Capitol Leasing Corporation will commence operation as a going concern with substantially no debts. (R. 5) It will own a fleet of trailers and have a substantial rental outlet system from which to operate the trailers.

But for the intervention of the Commission, the plan would have been completed within a reasonable time after its acceptance on March 7, 1963. Instead, the trailer owners, who are the real parties in interest, have been compelled to stand by and wait and wonder when and how their interests will be settled. Frustration and uncertainty have resulted. Trailers have been lost or stolen. Station operators have, in some cases, gone out of business. Trailers have been lost through foreclosure of storage liens. Trailer owners still hopefully look to Capitol Leasing to continue the business as the only means through which they can now benefit.

At this late date, a transfer of this proceeding to a Chapter X would be futile and fatal; straight bankruptcy would inevitably result. Chapter X would have been futile and fatal a year ago. No interest of secured creditors are involved and Chapter XI seemed then and now the only realistic and proper remedy.

THE STATUTE (CHAPTER XI) DOES NOT PROHIBIT THE ARRANGEMENT PROPOSED BUT RATHER PERMITS AND ANTICIPATES SUCH USAGE. BY USE OF DISCRETION IN THE LOWER COURTS, THE INTERRELATION OF CHAPTER X AND CHAPTER XI CREATES A COUNTERBALANCE TO THE END OF MORE EFFECTIVE USE OF THE TWO CHAPTERS.

The relevant section of Chapter XI provides:
Section 306(1) of Chapter XI (11 U.S.C. 706(1)):
For the purposes of this chapter, unless inconsistent with the context—
(1) "Arrangement" shall mean any plan of a debtor for the settlement, satisfaction, or extension of the time of payment of his unsecured debts, upon any terms;"

As can be seen, nowhere in Chapter XI is the type of arrangement proposed here prohibited. The prohibition exists only in the mind of the Securities and Exchange Commission.

There is no prohibition against this arrangement because such restrictions would require the use of Chapter X as a legalistic exercise in futility.

Is it by the belief that *no* management is capable or desirous of proposing a reasonable arrangement where the public is involved? This question answers itself. Day

by day thousands of people are making determinations and proposals involving the regulation of their transactions with other people in an honest and reasonable manner. This multitude necessarily includes many people involved in management of many business concerns. Certainly we need safeguards against those who do not measure up to this standard of character, and such safeguards are provided in Chapter XI. (In the power of the District Court to dismiss any improper proceeding). It is completely illogical to presume that no management is capable or desirous of proposing a reasonable plan where the public is involved.

What advantages could Chapter X have afforded? A trustee to take over the assets? He could not take over the trailers nor receive any rent from them; nor was there any property of value which he could have realized any upon. Causes of action — against whom and what? The Commission has not said. The necessary expenses of administration which have become traditional in Chapter X, how could they have been paid? In short, the Commission would have a trustee, a complete stranger to the business and to trailer owners, take charge of the business with no assets, taking months to become familiar with the business, and being unable to formulate any plan except one substantially like this and finally being faced with reporting to the Court that he had a plan which might work but unfortunately no money for administration and no trailers left. The legalistic exercise involved in the Section 328 motion seems to intrigue the Commission but would not and has not benefited anyone.

It is quite clear that a receiver would not, in this case, be as capable of operating the business as the man-

agement during the period necessary to effect the plan. This is a service company, its assets are negligible, the fundamental asset (aside from the existence of the system) is the knowledge of the trailer rental business on a nationwide scale, and without this knowledge any operation is foredoomed.

Chapter XI anticipates the exercise of discretion by the courts in a determination as to use of Chapter XI as against Chapter X.

Is this proposal prohibited by the belief that the United States District Courts are incapable of separating the reasonable from unreasonable plans? This is just not true. The very fact that Congress established two methods of reorganizing or arranging with creditors and this Court's reliance on the discretion of the lower courts establishes that the lower courts are capable of making such distinctions, and in fact are required to make such distinctions.[8] The statute makes only one requirement in a Chapter XI and that requirement is that the arrangement be with unsecured creditors. (Section 306(1), Chapter XI (11 U.S.C. 706 (1)). A Chapter X may deal with secured creditors. Aside from these specific requirements, the

[8]The comparable provisions of Chapter X and Chapter XI are quite similar (excluding secured creditors) Section 216(1) of Chapter X (11 U.S.C. 616(1)) provides:

"A plan of reorganization under this chapter —

(1) shall include in respect to creditors generally or some class of them, secured or unsecured, and may include in respect to stockholders generally or some class of them, provisions altering or modifying their rights, either through the issuance of new securities of any character or otherwise;"

Section 306 (1) of Chapter XI (11 U.S.C. 706(1)) provides:

"For the purposes of this chapter, unless inconsistent with the context —

(1) "Arrangement" shall mean any plan of a debtor for the settlement, satisfaction, or extension of the time for payment of his unsecured debts, upon any terms;"

statute makes no distinction and leaves it to the discretion of the Court.[9] It has been argued that this leaves the door wide open for questionable tactics by management, but this is not true. The relative informality of a Chapter XI is controlled by the discretion of the lower court to dismiss, if a plan is proposed which requires the formal procedure of a Chapter X. This determination must be based upon the meeting of the needs to be served, not upon an arbitrary determination that certain types of creditors (except secured) have claims against the company. (*General Stores Corp. v. Shlensky*, 350 U.S. 462). The Securities and Exchange Commission completely overlooks the fact that such distinctions could have been included in Chapter XI if Congress had so intended. This Court has stated that such distinctions do not exist and the general determination must be based upon the needs to be served. (*General Stores Corp. v. Shlensky, supra.*)

Chapter X is not the panacea of distressed Corporations the Securities and Exchange Commission would have us believe it is.

As opposed to the acceptance of the plan proposed by the respondent in three months, the district court observed that Chapter X reorganizations are expensive, time consuming and didn't work. (R-144) The district court was justified in its conclusions.

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[9] A clear statement of this principle is set forth **In the Matter of Transvision, Inc.**, 217 F.2d 243,246 Writ of Certiorari denied 75 S.Ct., 440:

> "The Supreme Court has declared that this determination as to the adequacy of the relief afforded by Chapter XI is one within the purview of the district court's discretionary exercise of its equity powers, **Securities and Exchange Commission v. U.S. Realty Co., supra**, 310 U.S. at page 450, 60 S.Ct. 1044, and unless the petitioner's corporate and financial condition is demonstrably such as to indicate that the district court has abused that discretion, its determination should be sustained."

The 25th through 29th annual reports of the Commission for its fiscal years ended June 30 of 1959 through 1963 illustrate the length of time involved in corporate reorganization and the probability of success. The cases named in these reports do not purport to be all of the corporate reorganization cases in that the Commission selected those in which it participated. These cases (parent and subsidiary are regarded as one case) are summarized:

	1959	'60	'61	'62	'63
Number of cases in which Commission participated	49	52	56	64	91
New cases during year	14	9	11	18	32
Cases closed during year	4	7	8	5	13
Cases remaining at end of year in which Commission was participating	45	45	48	59	78

These reports merely refer to the cases as "closed" which may mean the Commission withdrew from participation, the debtor was thrown into straight bankruptcy, or that there was a reorganization. Only one case (Muntz T. V. Inc.) might be regarded as a completed reorganization. While the Commission does not control the full course of reorganization and each case must stand on its own facts, the above summaries do illustrate the time and uncertainties involved in reorganization. They also cast some doubt on the Commission's "expertise" in the area of corporate reorganization.

These reports also refer the Chapter X cases initiated in the district court for Colorado and show their termination, three in straight bankruptcy. Another (U. S. Durox of Colorado) is described as a reorganization by

liquidation of assets which was actually a sale of all of the assets of that debtor to the holder of the mortgage on all its assets; the holder of the mortgage (Small Business Administration) was allowed to foreclose, but required to pay the expense of administration of $121,000 and creditors got nothing.

Again an examination of these annual reports of the Commission illuminate the accomplishments of the trustee. Of the cases referred to in these annual reports, only two are cited which show the recovery of money by a trustee.

The Securities and Exchange Commission must prove that a Chapter X is available to the particular debtor as a part of its motion to dismiss under Section 328 *which it has not done.*

The Securities and Exchange Commission has overlooked a relevant portion of the very section upon which this matter rises. Section 328 provides:

Chapter XI, Bankruptcy Act; Section 328 (11 U.S.C. §728)

"Dismissal Proceedings; Amended Petitions

"The judge may, upon application of the Securities and Exchange Commission or any party in interest, and upon such notice to the debtor, to the Securities and Exchange Commission, and to such other persons as the judge may direct, if he finds that the proceedings *should have been brought* under chapter 10 of of this title, enter an order dismissing the proceedings under this chapter, unless, within such time as the judge shall fix, the petition be amended to comply with the requirements of chapter 10 of this title for the filing of a debtor's petition or a creditors' petition

under such chapter, be filed. Upon the filing of such amended petition, or of such creditors' petition, and the payment of such additional fees as may be required to comply with section 532 of this title, such amended petition or creditors' petition shall thereafter, for all purposes of chapter 10 of this title be deemed to have been originally filed under such chapter." (Emphasis added)

The portion overlooked by the Securities and Exchange Commission in all of its arguments is that the plan may be dismissed if the judge finds the proceedings should have been brought under chapter 10. The language of the statute limits the application of the section to a case which should have been brought under Chapter X, a fortiori, can qualify under Chapter X. To date the Securities and Exchange Commission has conveniently ignored this portion of the section and has not presented any evidence to indicate the availability of Chapter X[10] and it is clear that Chapter X is not available.

There is no proof of need for a Chapter X.

However, presuming, arguendo, that the Securities and Exchange Commission had proved the availability of Chapter X and even that the proceedings should have been brought as a Chapter X, the court is still not required to

[10]The Securities and Exchange Commission must establish its contentions by factual presentation as is set forth in **Grayson-Robinson Stores, Inc. v. Securities and Exchange Commission,** Second Circuit, 32 F.2d 940,949:

"The Commission (Securities and Exchange Commission) is no more relieved from the need of producing evidence on such a factual issue than are other litigants; . . ."

The Securities and Exchange Commission, in the case at bar, did not present evidence on most of its allegations, relying instead on innuendo and implication. No good reason appears at hand for this failure, particularly when granting of the motion to dismiss would harm the very persons (the trailer owners) who the Securities and Exchange Commission claims to be protecting.

dismiss as the responsibility for determining the appropriateness of a particular plan rests ultimately with the ditsrict court. At no point has the Securities and Exchange Commission indicated the *need* for a Chapter X except that they would like to run an investigation. The company has filed a full disclosure registration with the Securities and Exchange Commission and the prospectus is a part of the record here, and had, prior thereto undergone investigation by the Securities and Exchange Commission, and yet nothing was acquired from these investigations of relevance to this proceeding. The Securities and Exchange Commission did not show the court any irregularities of management for which corrective action could be taken.[11] The purpose of an arrangement is not the pursuit of a will-o'-the-wisp but to see that the needs to be served are met. This is particularly true where the instigator of the pursuit can advise the court of no purpose in the pursuit. The Securities and Exchange Commission would superimpose upon Chapter XI a new section, absolutely excluding from its operation a plan which provides for public investor-creditors with participation by stockholders. The statute clearly does not so provide[12] and if Congress had so

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[11]One of the original directors appropriated about $140,000 of the funds of the company. That director died, leaving no estate. This amount was intended for trailer purchase and the subject trailers were subsequently manufactured and paid for.

[12]In fact the statute provides quite the contrary;

Chapter XI, Section 366 (11 U.S.C. §766)

"Requisites for confirmation

"The court shall confirm an arrangement if satisfied the — (1) the provisions of this chapter have been complied with; (2) it is for the best interests of creditors and is feasible; (3) the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt; and (4) the proposal and its acceptance are in good faith and have not been made or procured by any means, promises or acts forbidden by this title.

"Confirmation of an arrangement shall not be refused solely because the interest of a debtor, or if the debtor is a corporation, the interests of its stockholders or members will be preserved under the arrangement."

In the case at bar the stockholders have, in fact, retained a minor (12%) interest in Capitol Leasing Corporation.

intended the statute would so provide. If the Securities and Exchange Commission is sincerely convinced that the district courts, as a whole, are incapable of exercising the discretion which the statute and this Court provide, let them approach Congress, advise them of the ineptitude of our judiciary, and have the statute amended.

Chapter X and Chapter XI both provide for arrangements with unsecured creditors and thereby provide a counterbalance, one for the other.

The statutes which are presently in effect and not those which the Securities and Exchange Commission would like, are those with which we must deal. In the relevant portions, Chapter X and Chapter XI are similar. That is, they both are intended for the arrangement of unsecured creditors' claims and continuance of operation of the company. The rationale of the existence of the two means of alleviating the financial stress of a corporation becomes readily apparent when one considers the portion of each statute in which reference is made to the other statute. Chapter X provides that it must be shown that Chapter XI does not provide adequate relief.[13] Chapter XI provides that it may be dismissed if the proceeding should have been brought under Chapter X.[14] The obvious intent

[13]The relevant section provides:
Chapter X, Section 130 (11 U.S.C. §530)
"Every petition shall state — . . . (7) the specific facts showing the need for relief under this chapter and why adequate relief cannot be obtained under chapter 11 of this title; . . ."

[14]Chapter XI, Section 328 (11 U.S.C. §728) which is set forth in full at page 3 hereof provides generally that the judge may, if he finds the proceedings should have been brought under Chapter X, enter an order dismissing the proceedings unless the petition is amended to conform to Chapter X.

is that use of Chapter XI is perferred,[15] but the foregoing provision of Chapter XI operates as a counterbalance, for if the court finds the arrangement needs the safeguards of Chapter X, it may dismiss. No such need has been shown here. Conversely, a proceeding under Chapter X may be transferred to a Chapter XI if Chapter XI would provide adequate relief.[16]

The district court corectly applied the provisions of Chapter XI to the case at bar.

A question to be asked at this point is, did the district court follow the apparent dictates of the statute? The court (in the person of the Senior Referee in Bankruptcy as Special Master) investigated the potential of recovery of monies from past management. He was advised that there was no possibility of recovery of any monies from past management and present management could completely account for their stewardship. (R. 122-125) The Securities and Exchange Commission offered nothing contrary to this position, despite their previous investigation, and this stands uncontradicted. The court (in the person of the Senior Judge of the District, Alfred A. Arraj) pro-

[15]As stated by the court of appeals, second circuit, **In the Matter of Transvision, Inc.**, 217 F.2d 243:

"Indeed, the Bankruptcy Act itself, in requiring every petition under Chapter X to state 'why adequate relief cannot be obtained under Chapter XI' Bankruptcy Act, §130(7), 11 U.S.C.A. §53(7), and in declaring that 'A (Chapter X) petition shall be deemed not to be filed in good faith if*** (2) adequate relief would be obtainable by a debtor's petition under the provisions of Chapter 11 of this title,' Bankruptcy Act §146, 11 U.S.C.A. §546, manifests a conscious purpose of Congress to encourage resort to Chapter XI whenever the remedy afforded thereby adequately protects the interests involved."

[16]The relevant section provides:

Chapter X, Section 147 (11 U.S.C. §547)

"Amendment of Petition to Comply with Provisions Governing Arrangements

"A petition filed under this chapter improperly because adequate relief can be obtained by the debtor under chapter 11 of this title may, upon the application of the debtor, be amended to comply with the requirements of chapter 11 for the filing of a debtor's petition, and shall thereafter for the purposes of chapter 11 be deemed to have been originally filed thereunder."

pounded objections to the plan of arrangement. (R. 146) Each of the objections resulted in direct action in the form of an amendment to the plan. (R. 148-150) It was clear that if the plan, in its final form, was not what the court considered proper, it would be dismissed. (R. 146) The Securities and Exchange Commission has not renewed its motion to dismiss but has appealed on the single point that the proposed plan adjusts the rights of the trailer owners and provides some participation to the stockholders. An examination of the plan shows a drastic reduction from the previous position occupied by the stockholders of American in addition to the continuing contributions of the directors. (R. 7)

The proper application of the provisions of Chapter XI has afforded the company a chance for success to the benefit of the interests to be served.

The proposed plan is not prohibited by the statute. To the contrary, the logic of the statute anticipates the handling of a plan of arrangement in the manner this matter was handled. The statute is focused on the duty of the district court.[17] If the plan is one which is shown to require the use of the cumbersome machinery of Chapter X, dismiss the Chapter XI. If the plan is one which is proper as proposed or as amended, use the more economical route of Chapter XI. Thus the two chapters act as counterbalances for each other. They prevent oppressive or unfair plans on the one hand, and allow proper plans to function without oppressive machinery on the other. By proper exercise of its discretion, the district court can effect a real service to the interests to be served in a distressed corporation. The district courts have this dis-

[17]In the case of an improper Chapter X, the court may permit amendment to Chapter XI; in case the Chapter XI proceedings should have been brought as a Chapter X, it may dismiss; which actions are within the sound discretion of the district court.

cretion (*General Stores Corp. v. Shlensky*, 350 U.S. 462) and the exercise of discretion is the bulwark of any effective plan. To wed a corporation to a Chapter X merely because of the existence of a particular type of creditor is to leave many corporations with no alternative to ordinary bankruptcy. Clearly, the statute does not anticipate this, but intends that a corporation with a fair opportunity for success have that opportunity.

THE LOWER COURTS, IN EXAMINING A PROPOSED CHAPTER XI, ARE BOUND TO EXERCISE A SOUND JUDICIAL DISCRETION IN DETERMINING WHETHER A CHAPTER XI MEETS THE NEEDS TO BE SERVED AND ARE BOUND BY ARBITRARY STANDARDS. IN THIS CASE THE COURT CORRECTLY DETERMINED THAT CHAPTER XI MET THOSE NEEDS AND CHAPTER X DID NOT.

This Court has long recognized the necessity of flexibility in application of Chapter X or Chapter XI, which recognition is most evident in the application of the doctrine of "discretion of the lower courts."[18] The previous decisions on the question have indicated the awareness of this Court that no set formula can be applied in every case.[19] They recognize that in two given cases, with similar

[18] **General Stores Corp. v. Shlensky**, 350 U.S. 462-468:
"We could reverse their (the lower courts) only if their exercise of discretion transcended the allowable bonds."

[19] **General Stores Corp. v. Shlensky**, 350 U.S. 462, 465:
"Much of the argument has been devoted to the meaning of **Securities & Exchange. Com. v. United States Realty & Inprov. Co.** 310 U.S. 434, 84 L.ed. 1293, 60 S.Ct. 1044. In that case we held that relief was not properly sought under Chapter XI but that Chapter X offered the appropriate relief. That was a case of a debtor with publicly owned debentures, publicly owned mortgage certificates, and publicly owned stock. An arrangement was proposed that would leave the debentures and stock unaffected and extend the certificates and reduce the interest. It was argued that in that case, as it has been in the instant one, that Chapter X affords the relief for corporations whose securities are publicly owned, while Chapter XI is available to debtors whose stock is closely held; that Chapter X is designed for the large corporations, Chapter XI for the smaller ones; that it is the character of the debtor that determines whether Chapter

capital structure and similar creditors, one may require a Chapter X and the other may best function under a Chapter XI. In its reasoning, this Court has followed the dictates of the provisions of the state and has refused to sanction the application of arbitrary standards. (*General Stores Corp. v. Schlensky,* 350 U.S. 462, 465). This Court has rather, directed the lower courts to exercise discretion in determining whether a Chapter X or a Chapter XI is the proper forum. The lower courts having heard the witnesses, met with creditors, examined the plan and watching the administration in general, is the proper body to exercise discretion. The lower court may be reversed if it has clearly abused its discretion. (*General Stores Corp. v. Shlensky, supra.*) But in this case, the question presented is not abuse of discretion. The question challenges the judgment of the lower court and states that the arrangement proposed cannot be done under Chapter XI. This challenge does not stand to the test of reason, to the test of an examination of the statutes involved, or to the test of previous decisions.

This Court has previously rejected the imposition of arbitrary standards, relying instead on the discretion of the lower court and in this case, the lower court, in the exercise of that discretion, committed no abuse.

The Securities and Exchange Commission has previously contended that particular capital structure or the presence of particular types of creditors determines with finality the propriety of Chapter X or Chapter XI. This proposition has been firmly rejected by this Court. (*General Stores Corp. v. Shlensky,* 350 U.S. 462) In the course of rejecting that contention, this Court has advised that reversal may be had only upon an abuse of discretion by

[19] (continued)
X or Chapter XI affords the appropriate remedy. We did not adopt that distinction in the **United States Realty** case."

the lower courts. (*General Stores Corp. v. Shlensky, supra.*) This is clearly the tenor of the statutes themselves. Yet the question is not based upon an abuse of discretion. The reason for this is clear enough; there was no abuse of discretion. The lower court examined the plan, the history of the company, heard the statements of counsel, heard the participating creditors, examined witnesses, and made some objections to the plan. (R. 146)

> "Now, I have, or, I want to express for the record some objection to the proposed plan. I do not think that the proposed plan gives the owners of the trailers a fair shake.
>
> "In other words, unless this plan that is finally determined in this case under the Chapter 11 is such a plan that the investors themselves will have control of this corporation and not the management who got it in this shape, then I say it will be an improper plan. Therefore, that would suggest that the investors should have more than one share of stock for each two dollars and management less than one share for each three dollars and a half, but at any rate, the proportion of the ratio should be such as the investors will have control of the corporation. This is the only way, in my opinion, that it can properly operate.
>
> "Now, also in connection with the plan, consideration should be given to treating all creditors alike. One creditor should not be paid just because the officer guaranteed that payment and another creditor not paid in cash. The bank, for example. These people are knowledgable in this business. They are sophisticated lenders, and to treat them with some special treatment as against an individual who is a creditor is not, in my opinion, equity or justice."

An examination of the amendments thereafter made (R. 148-150) indicates the firmness with which the district court handled this arrangement. Given the opportunity which Chapter XI affords, the court can, and under a proper exercise of its discretion will, perform a valuable service in this area. This service many times includes, as in this case, the opportunity for creditors to considerably improve their position over that which they would occupy in an ordinary bankruptcy as the only other available procedure. (R. 161)

If restrictions such as requested by the Securities and Exchange Commission had been intended to be applied to Chapter XI, Congress would have so provided.

Had Congress intended to restrict the use of Chapter XI to only certain types of creditors, or intended to exclude certain types of creditors, such a restriction or exclusion could have easily been included in the statute. But no such restriction or exclusion exists. This Court has twice refused to assume the responsibility of the legislative branch and has not itself written such restrictions where none exist. (*General Stores Corp. v. Shlensky*, 350 U.S. 462) (*Securities and Exchange Commission v. United States Realty & Improvement Co.*, 60 S. Ct. 1044).

The Securities and Exchange Commission wants the absolute priority of claims doctrine applied even though it has been removed from the statute and Congress has made clear that it is not to be applied.

The main burden of the Commission's brief is that a plan of arrangement under Chapter XI should be judged by Chapter X and that the "fair and equitable" standard and the rule of absolute priorities of Chapter X must be

applied in determining whether a Chapter XI proceeding should be transferred to Chapter X and further that any preservation of interests of stockholders without new contributions on their part violates this standard and rule.

This argument fails to recognize the full import of the 1952 amendments to Chapter XI and the Congressional purpose and intent in amending the Chapter. The amendment to Section 366 (11 U.S.C. §766) of Chapter XI eliminated this standard and rule from consideration. The section now provides that the plan be "feasible" and "in the best interest of the creditors", and appears as follows:

> "Requisities for Confirmation
>
> "The Court shall confirm an arrangement if satisfied that — (1) the provisions of this chapter have been complied with; (2) it is for the best interests of the creditors and is feasible; (3) the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt; and (4) the proposal and its acceptances are in good faith and have not been made or procured by any means, promises or acts forbidden by this title."

Another paragraph was added to the section at that time which clearly established the intention of Congress. Section 366 (11 U.S.C. §766)

> "Confirmation of an arrangement shall not be refused solely because the interest of a debtor, or if the debtor is a corporation, the interests of its stockholders or members will be preserved under the arrangement."

The Securities and Exchange Commission will have us believe that this amendment was "perfecting or clarifying". However, the legislative history of the amendments does not substantiate this view, and quite the contrary, shows that the changes were substantive: U.S. Code Cong. & Admin. News, 1952, P.1981, 1982, 82nd Cong. 2d Sess., p. 21, H. R. Rep. No. 2320:

This amendment to Section 366 gives further meaning to Section 306(1) (11 U.S.C. 706(1) that an "arrangement may mean any plan — for the settlement, satisfaction — of unsecured debts, *upon any terms*" and Section 357(8) (11 U.S.C.) that an arrangement may include "any other appropriate provisions not inconsistant with this Chapter. Since Section 366 allows preservation of interests of stockholders without new contributions from them, a plan which preserves the interests of stockholders to some extent only and which gives preponderant and dominant control to creditors is not inconsistent with Chapter XI.

Congress made a clear and definitive statement as to its purpose and intent in eliminating "fair" and "equitable" and the rule of absolute priorities from consideration in Chapter XI. This is explained in Senate Report No. 1395, 82d Cong., 2d Sess. (1952):

> "Sections 35, 43, and 50 of the bill make similar changes in section 366 (3), 472 (3), and 656a (3) of the act. The language 'fair and equitable' was derived from section 221 (2) of Chapter X, in which, for the purposes of a corporate reorganization, the requirement is sound and necessary. However, the fair and

equitable rule cannot be applied in a Chapter XI, XII, or XIII proceeding, if construed as interpreted in *Northern Pacific Railway Co. v. Boyd* (228 U.S. 482, 33 S.Ct. 554, 57 L.Ed, 931 (1913), and reaffirmed in *Case v. Los Angeles Lumber Products Co., Ltd.* (308 U.S. 106, 41 Am. B. R. (N. S.) 110, 60 S.Ct. 1, 84 L.Ed. 110 (1939)), without impairing, if not entirely making valueless, the relief provided by these chapters. If so applied, no individual debtor or corporate debtor (where stock ownership is substantially identical with management) under chapter XI, and no individual debtor under chapter XII or XIII can effectuate an arrangement or plan by scaling of debts.

"The fair and equitable rule was never applied in a composition proceeding under the former section 12 of the Bankruptcy Act, which has been replaced by Chapter XI, nor is it practicable or realistic to apply it in a proceeding under Chapter XI, XII, or XIII.

"The amendment removes the 'fair and equitable' provision and by a paragraph added to each of the amended sections it is made clear that it shall not be applied thereunder.

To the same effect, is the House Report No. 2320, 82nd Cong., 2d Sess. (1952) 21.

The amendment does not mean that a plan can be unfair (in the general sense of the word) it merely signifies the recognition of the unworkability of the absolute priority rule in certain cases. As a prime example, the present case. The trailers must be kept in operation through continuous administration of the company; the company is, in ef-

fect a service company providing a rental outlet for the many trailers owned by individuals; the leases for the operation of the trailers are uneconomical; any arrangement providing cash payment of the back obligations to trailer owners is unrealistic in view of the continuingly increasing obligations on current operation of the trailers; therefore, the ownership of the trailers must be in the company; the most economical manner of obtaining a system is one where the previous owners of that system delay their compensation until such time as the system is paying its way, hence the issuance of stock for the system as an incident of the plan. The issuance of shares of Capitol Leasing Corporation to the shareholders of the respondent for the assignment of the rental system gave meaning to the plan; it did not adversely affect creditors or trailer owners to have this stockholder interest continued. Since respondent had no significant assets, creditors would have received nothing in bankruptcy or Chapter X. The method proposed provides an operating system and the trailers to operate, both in a substantially debt-free company. While it would be difficult to say that Congress specifically had this particular case in mind when amending Chapter XI, it is not beyond the realm of reasonableness to say that Congress generally had such a situation in mind.

That Congress did not have in mind the restrictions which the Securities and Exchange Commission would impose is clear from the statute itself. At no place in Chapter XI is such a restriction mentioned. This Court has, when asked to write this type of restriction, twice refused. (*General Stores Corp. v. Shlensky*, 350 U.S. 462) (*Securities and Exchange Commission v. United States Realty & Improvement Co.*, 60 S.Ct. 1044). This Court has, to the contrary, said that no such restrictions exist and that the

only grounds for appeal is abuse of discretion by the lower court. This case does not involve an abuse of discretion but rather involves an attempt by the Securities and Exchange Commission to have this Court reimpose the doctrine of absolute priority in a statute from which Congress has previously removed it.

The lower courts have a maximum control over the reasonableness or general fairness of a Chapter XI proceeding.

Of course, this does not give license to the imposition of an unreasonable or improper plan upon creditors, even after confirmation, because of the counterbalance provided by the interrelation of Chapter X and Chapter XI. If the plan proposed under Chapter XI is improper, the lower court may dismiss it. If the company is the type which can seek relief under a Chapter XI, a Chapter X can be transferred. This is possible by the provisions of Section 328, Chapter XI, *supra*. This section, in relation to Chapter X, Sections 130 and 147, *supra*., can lead to only one conclusion. A wide latitude of arrangements are possible under a Chapter XI which must operate only at the discretion of the district court. This has been the tenor of the opinions of this Court. By these precepts the statutes provide the greatest possible assistance to rehabilitation of financially distressed companies and the salvation of creditors' interests.

The lower court, in this case, exercised its discretion after an examination of all factors, followed the dictates of the statute and this Court and provided an opportunity for meeting the needs to be served which is vastly superior to the only alternative, ordinary bankruptcy.

Has the lower court exercised its discretion in this matter? The answer is a clear yes. The district court made clear that it felt that the trailer owners were entitled to more stock in ratio to the director-stockholder creditors. (R. 146) The plan was amended (prior ratio 4 to 7 pro rata on dollar amounts claimed, in favor of trailer owners, amended ratio 4 to 11 in favor of trailer owners). (R. 148-150) The court felt two creditors were being favored. (R. 146) The plan was amended. (These obligations were assumed by some of the directors and stock will be issued at the same 4 to 11 ratio in favor of the trailer owners) (R. 149) The court wanted control of the new company in the trailer owners. (R. 148) The plan was amended (the director-creditors voting only one vote for every seven shares of stock, — voting ratio 4 to 77 pro rata on dollar amounts claimed in favor of the trailer owners — the director-creditors not participating in dividends or liquidation for five years). (R. 148-149) The court had closely examined the plan and, exercising its discretion, stated its position in this matter. That the debtor had already determined on amendments is not significant. The point is that the court has examined the plan and determined it wanted changes. The lower court followed the logic of the statute and the dictates of this Court. By prudent exercise of the court's discretion, this corporation has been given the opportunity to salvage some of the interests of the concerned parties. This is to be contrasted with the only other alternative, ordinary bankruptcy. (R. 161)

CONCLUSION

On December 20, 1962, when the petition was filed in this proceeding, American Trailer Rentals Company was a company with no substantial assets. It was obligated on leases which were useless to the trailer owners and an impossible burden on the company. Its obligations were mounting daily and it was readily apparent that no solution existed for the company within the framework of the contractual obligations which it faced. Of necessity it had to seek relief under such statutes as might afford it relief.

The only alternatives available to this company were: (1) Ordinary Bankruptcy — which provided nothing for the trailer owners, the general creditors or the stockholders; (2) Chapter XI — which provided a relatively simple manner of adjusting the claims of creditors, including trailer owners; the continuance of experienced management and maintenance of the system, primarily for the benefit of trailer owners. It presented a choice to the trailer owners to remove their trailers or leave them in the system, voluntarily; and (3) Chapter X — by virtue of which a trustee would be appointed and a lengthy time allotted to examination of the affairs of the company. He must report to the creditors on his findings and devise a plan. He must thereafter submit the plan to the Securities and Exchange Commission and to the court. Then and only then may the plan be submitted to the creditors to determine if it is acceptable. *Any feasible plan, when and if evolved, would necessarily be based upon the same structure as the plan herein proposed.* This procedure would more likely end in the trustee reporting that because of the lack of funds and the time consummed, no feasible plan under Chapter X could be presented. It is evident

the only result would be ordinary bankruptcy with no assets to distribute to creditors and with many trailer owners' trailers becoming lost. Any attempt now to convert to Chapter X at this date would result in a greater loss to the trailer owners.

The plan proposed, accepted by the creditors, including trailer owners, approved and confirmed by three separate courts, provides a fair arrangement with the trailer owners for their trailers, and provides the only feasible manner of meeting the needs to be served of the interests involved. In refusing to dismiss, the lower courts properly exercised their discretion and allowed the trailer owners, whose interests are paramount, an opportunity to salvage something from their trailers which neither ordinary bankruptcy nor Chapter X could provide.

Respectfully submitted,

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